SUPREME COURT, U. S.

MAY 2 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1343

THOMAS WILKINSON, *Petitioner,*

v.

STATE OF OHIO, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

GEORGE E. TYACK,
Eight East Broad Street
Columbus, Ohio 43215
Member of the Bar of the
United States Supreme Court
Counsel for Petitioner.

JOHN O. CROUSE,
Prosecuting Attorney
Highland County, Ohio
Hillsboro, Ohio
Counsel for Respondent.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Constitutional provisions involved	2
Statement of the Case	2
Law and Argument in Support of Petition	5
Conclusion	7
Appendix A—Amendments to the Constitution of the United States	8
Appendix B—Opinions and judgments below	9
Appendix B-1: Journal entry, Supreme Court of Ohio Mandate, Supreme Court of Ohio	10
Appendix B-2: Opinion, Ohio Supreme Court	11
Appendix B-3: Journal entry, Court of Appeals	19
Appendix B-4: Opinion, Court of Appeals	20
Certificate of Service	26

CITATIONS

Cases

Anders v. California, 386 U.S. 738 (1967)	6
Dohany v. Rogers, 281 U.S. 362	6
Entsminger v. Iowa, 386 U.S. 748 (1967)	6
Gideon v. Wainwright, 372 U.S. 335 (1963)	5
Sheppard v. Maxwell, 387 U.S. 333	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. .....

THOMAS WILKINSON, *Petitioner*,

v.

STATE OF OHIO, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in the above case on February 5, 1969.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals of Highland County is unreported and is printed in Appendix B hereto, *infra*, p. 19. The opinion of the Ohio Supreme Court printed in Appendix B hereto, *infra*, p. 11, is reported in 17 Ohio St. 2d 9.

JURISDICTION

Judgment of the Ohio Supreme Court was entered on February 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

I.

Where counsel for the defendant is notified by an official of the trial court that the defendant will not be brought to trial on a previously established trial date, and acts in

reliance thereon, and then is compelled to go to trial on that date without notice and, as a result of said act, defense counsel refuses to participate in the trial, does not voir dire members of the jury, cross-examine witnesses or present testimony on behalf of the defendant, has the defendant, in these circumstances, been deprived of the effective assistance of counsel and due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States.

II.

Where a defendant is brought to trial on a secret indictment and where a previously sustained motion for a Bill of Particulars is honored by the State on Friday afternoon when the matter is set for trial at 9:00 a.m. on Monday morning, has the defendant been denied due process of law.

III.

Where prior to trial certain publicity read by most of the jurors attempts to tie the defendant to a "notorious gang" and where, at the commencement of trial, there are present in the courtroom thirteen uniformed police officers, has the State created an atmosphere so as to deprive the defendant of a fair and impartial trial guaranteed him under the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provisions involved are the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. They are printed in Appendix A below, page 8.

STATEMENT OF THE CASE

On March 12, 1966, an affidavit was filed in the Hillsboro Ohio Municipal Court against the petitioner charging him with larceny by trick. A preliminary examination was

scheduled in accordance with that Court's rules. Prior to the date of the preliminary examination, the petitioner was indicted in a secret indictment by the Grand Jury of Highland County along with the other two defendants. The indictment contained six counts, of which the first three were tried in the trial court in the instant case. The defendant was convicted of the first and third counts involving charges of larceny by trick and blackmail, both referring to the same sum of money, $11,300.00, as contained in the initial affidavit filed in the Municipal Court. Defendant was arraigned, pled not guilty and later demanded a Bill of Particulars. The trial court sustained the motion for the Bill of Particulars, in part. The matter was initially set for trial on November 21, 1966. On the 18th of November the State filed a "Bill of Particulars" which only in part complied with the Court's original order. Approximately one week before the scheduled trial date of November 21, 1966, an apparent misunderstanding arose between the trial judge and the clerk of courts as to whether this petitioner was to be tried with the two other defendants on the 21st. As a result, the clerk of courts advised counsel for the petitioner that only the other two defendants would be tried and that the petitioner would not be tried on the same date.

Petitioner's counsel appeared in Court on the 21st of November for the purposes of observing the trial of the other two defendants, only to be informed that he was to produce the petitioner as he was to be tried at the same time. The petitioner was compelled to attend trial despite a disabling physical condition. Petitioner's counsel requested a continuance on the grounds that he had not been notified of trial and that the petitioner was unable physically to withstand the rigor of the trial and that the State had failed to provide the Bill of Particulars ordered by the Court. The trial court overruled the motion and compelled the petitioner to go to trial. Throughout the course

of the trial, petitioner's counsel refused to present testimony; to cross-examine witnesses, to voir dire prospective jurors on the grounds that he was unprepared and consequently could not effectively represent the petitioner. The advent and trial of this cause was accompanied by adverse publicity which pervaded the entire atmosphere. The press and radio lent credence to a rumor that the City where the trial was to be held would, so to speak, be laid siege by a criminal gang. At the commencement of the trial, approximately one dozen armed and uniformed police officers were in the courtroom. This number, on motion of the defense, was reduced to three during the course of the trial.

The counsel for the petitioner first raised attention to his lack of notice prior to the voir dire of any of the potential jurors, as is set forth in the record of evidence at page 4.

> "I am Charles H. Wilson on behalf of the defendant, Thomas Wilkinson and I move for a continuance so far as this trial is concerned on his behalf for the reason that we had no notice that he was to be tried today and I was advised by the Clerk he would not be tried on October 26, 1966. We made a motion for a Bill of Particulars which was not furnished until November 18, as I was leaving my office. The Bill of Particulars as ordered by the Court has never been furnished. Due to the lack of a proper Bill of Particulars, we have not been able to have sufficient time with which to prepare a defense in this case. The hands of justice do require such a continuance."

The question as to the presence of police officers pervading the trial atmosphere was raised during the voir dire examination as found at page 52 of the record of the evidence.

> "I certainly am objecting strenuously to the enlarged number of police officers standing around here front and back of the courthouse and I don't know what this means, whether it is a Roman holiday or just what,

but I think it is an endeavor on behalf of the State of Ohio to prejudice this jury and from the things that have been printed in the paper here, and so far as I am concerned, I think they should be cleared from the courtroom.''

LAW AND ARGUMENT IN SUPPORT OF PETITION

I. Where counsel for the defendant is notified by an official of the trial court that the defendant will not be brought to trial on a previously established trial date, and acts in reliance thereon, and then is compelled to go to trial on that date without notice and, as a result of said act, defense counsel refuses to participate in the trial, does not voir dire members of the jury, cross-examine witnesses or present testimony on behalf of the defendant, has the defendant, in these circumstances, been deprived of the effective assistance of counsel and due process of law under the Sixth and Fourteenth Amendments to the Constitution of the United States.

II. Where a defendant is brought to trial on a secret indictment and where a previously sustained motion for a Bill of Particulars is honored by the State on Friday afternoon when the matter is set for trial at 9:00 a.m. on Monday morning, has the defendant been denied due process of law.

As indicated in the statement of facts, the then defense counsel was advised that this petitioner would not be brought to trial on the 21st of November, 1966 and, upon being compelled to appear with his client, refused to participate in the trial on the grounds that he had not had adequate notice and was not prepared to go to trial.

The right to effective counsel under the Sixth Amendment has been applied to the States in all instances since *Gideon v. Wainwright,* 372 U. S. 335 (1963). In addition the concept of the effective assistance of counsel incorporates the performance by counsel as an advocate and not

as a friend of the Court. See *Entsminger v. Iowa,* 386 U.S. 748 (1967); *Anders v. California,* 386 U.S. 738 (1967).

Further in order to be effective, counsel must have reasonable and adequate notice of the basis of the charges and of the time of trial, especially in light of the serious nature of the charges and the character of the rights affected by it. See *Dohany v. Rogers,* 281 U.S. 362. In the instant case, petitioner and his counsel were led to believe that he would not be brought to trial on the 21st of November, 1966 and once they were compelled to attend, counsel refused to participate in the trial. Thus it is submitted that the petitioner was effectively denied due process of law and effective assistance of counsel under the Sixth and Fourteenth Amendments to the Constitution of the United States.

III. Where prior to trial certain publicity read by most of the jurors attempts to tie the defendant to a "notorious gang" and where, at the commencement of trial, there are present in the courtroom thirteen uniformed police officers, has the State created an atmosphere so as to deprive the defendant of a fair and impartial trial guaranteed him under the Constitution of the United States?

As the trial commenced, a large number of uniformed police officers were present in the courtroom. In addition numerous newspaper articles, etc. had been published with relation to a so-called "notorious criminal gang," of which it was alleged this petitioner was a member. Some of the jurors admitted to having read one such article which was published in the local paper some two weeks prior to the time of trial. Thus the trial was commenced in an atmosphere bordering on an armed camp or a city in siege. Upon motion, the number of uniformed officers present in the courtroom was limited to three; however this was done in the afternoon of the first day of trial during the voir dire examination.

It is submitted that this type of situation is directly in violation of this petitioner's rights to a fair and impartial trial guaranteed him under the due process clause of the Constitution and runs directly contrary to the precepts established by this Court in *Sheppard v. Maxwell,* 384 U.S. 333.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE E. TYACK
Attorney for Petitioner.

APPENDIX A
AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX B-1
THE SUPREME COURT OF THE STATE OF OHIO
1969 TERM

To wit: February 5, 1969

No. 68-170

THE STATE OF OHIO,)
City of Columbus.)

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

THOMAS WILKINSON ET AL.,
Defendants-Appellants.

APPEAL FROM THE COURT OF APPEALS FOR HIGHLAND COUNTY

This cause, here on appeal from the Court of Appeals for Highland County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penality be assessed herein.

It is further ordered that the plaintiff-appellee recover from the defendants-appellants its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Highland County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this .....
day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX B-1
THE SUPREME COURT OF THE STATE OF OHIO
1969 TERM

To wit: Wednesday, February 5, 1969

No. 68-170

THE STATE OF OHIO,)
City of Columbus.)

THE STATE OF OHIO,
Plaintiff-Appellee,

vs.

THOMAS WILKINSON ET AL.,
Defendants-Appellants.

MANDATE

To the Honorable COMMON PLEAS COURT *within and for the County of* HIGHLAND, *Ohio, Greeting:*

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the Court of Appeals affirmed for the reasons set forth in the opinion rendered herein.

Thomas L. Startzman

..... 19....

.....

.....Deputy

APPENDIX B-2
THE STATE OF OHIO, APPELLEE, V. WILKINSON, APPELLANT.

(Cite as State v. Wilkinson, 17 Ohio St. 2d 9.)

Criminal procedure—Preliminary examination not required where defendant indicted—Blackmail and larceny by trick—Conviction of two crimes for obtaining possession of same money—Cruel and unusual punishment—Sentence to consecutive terms for separate crimes.

1. A preliminary examination is not required where there is an indictment on the charge for which defendant was arrested (Section 2937.34, Revised Code, construed.)
2. A defendant may be guilty of blackmail because of a demand for certain money, accompanied by a threat to the well being of a person's family, and also be guilty of larceny by trick because he obtained possession of the same money with the consent of the person from whom it was obtained which was induced by a false or fraudulent representation.
3. It is not a cruel and unusual punishment for a defendant to be sentenced to consecutive terms for separate statutory crimes.

(No. 68-170—Decided February 5, 1969.)

Appeal from the Court of Appeals for Highland County

Defendant Thomas Wilkinson, appellant herein, and codefendants Larry Burns and Houston Maynard were indicted by the grand jury of Highland County in one count for larceny by trick, in a second count for obtaining property by false pretenses, and in a third count for blackmail.

Defendant and each of his codefendants entered pleas of not guilty to these counts.

During their joint trial before a jury, the trial court dismissed the second count. Thereafter, the jury returned

verdicts of guilty on the first and third counts against defendant and his codefendant Maynard and found the other codefendant Burns not guilty.

Defendant's motion for new trial was overruled, and the Common Pleas Court sentenced defendant on the first and third counts.

The judgment of the Common Pleas Court was affirmed by the Court of Appeals.

The cause is now before this court as an appeal claimed to involve a constitutional question and pursuant to the allowance of a motion for leave to appeal.

Other facts are stated in the opinion.

Mr. John O. Crouse, prosecuting attorney, for appellee.

Messrs. Wilson, Willson & Wilson and *Mr. Charles H. Wilson,* for appellant.

Taft, C. J. Defendant's first complaint is that he was denied a preliminary examination and a bill of particulars, and thus that he was not afforded the right to be informed of "the nature and cause of the accusation" against him, as required by the Sixth Amendment to the Constitution of the United States and by Section 10 of Article I of the Ohio Constitution.

On March 12, 1966, the claimed victim of the crimes, with which defendant was charged, filed an affidavit in the Hillsboro Municipal Court, charging defendant with larceny by trick, and that court ordered a preliminary examination. However, defendant was indicted before the date set for that examination, and Section 2937.34, Revised Code, which provides for an examining court where there is no indictment, no longer applied. See paragraph one of the syllabus in *Kendle v. Tarbell* (1873), 24 Ohio St 196; *White v. Maxwell* (1963), 174 Ohio St. 186, 188, 187 N. E. 2d 878; *Crider v. Maxwell* (1963), 174 Ohio St. 190, 192, 187 N. E. 2d 875.

With respect to this complaint, defendant contends further that he was not furnished with a bill of particulars elaborating the offenses charged in the indictment, as

to the effect that defendant Wilkinson would not be tried with his codefendants, but there was never any order of the court or entry other than that setting the joint trial date of November 21, 1966. Also, the record indicates that defendant's counsel realized that the court intended to proceed with the trial on that date. On November 21, he filed a motion for continuance, specifying several grounds therefor. There is no mention of the clerk's statement in that motion. Thus, it is too late upon appeal to rely upon any such statement as a basis for any such motion for continuance.

One ground specified in that motion of November 21 for a continuance was that defendant was too ill to attend his trial.

Section 2945.02, Revised Code, provides in part:

" * * * * No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance."

As evidence in support of defendant's claimed physical disability, a statement from a local physician was introduced which identified defendant's affliction as a urinary bladder infection, with an "urgency to urinate." However, the doctor did not recommend delaying the trial and merely noted that sitting in court for long periods of time would be detrimental to defendant's health. Another physician concurred in the diagnosis, and both physicians agreed that defendant could sit in the courtroom, with frequent relief intervals. In the course of the trial, defendant was provided with frequent opportunities to relieve himself. We cannot conclude that the court unreasonably denied the requested continuance.

The third complaint of defendant is that pre-trial publicity identified the defendants as members of a "notorious gang," and that the presence of a large number of uniformed officers at the opening of trial and the statements of a prosecuting witness, characterizing defendant as

ordered by the Common Pleas Court of Highland County. Section 2941.07, Revised Code, provides for a bill of particulars, as follows:

" * * * * * The prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged."

Although defendant was arrested in April 1966 under this indictment, and the trial date of November 21, 1966 was set by an entry of the court on August 9, 1966, following an oral application by defendant's counsel to set a date for trial, the motion for a bill of particulars was not filed until October 27, 1966. This was hardly a seasonable request within the meaning of the above-quoted statute. The delay also tends to indicate that defendant was not ignorant of "the nature of the offense charged." Rather, as stated by the Court of Appeals, "it is evident that defense counsel wanted evidence given to them. This is not required of the prosecution."

The Common Pleas Court sustained the motion for a bill of particulars as to sevaral requests relating to each count in an order on November 16, 1966, and a bill of particulars was filed in compliance therewith on November 18, 1966. On that same date a copy was furnished defendant's counsel. In our opinion, there is no merit to defendant's first complaint.

The defendant's second complaint is that he was "not reasonably notified of his trial date," and was then forced to stand trial while ill and insufficiently prepared. As already indicated, the November 21, 1966 trial date was set at defendant's request on August 9, 1966, and an entry was filed to this effect. Counsel for defendant filed a motion for a separate trial and to sever the counts of the indictment. This was sustained only as to severance.

It was argued that counsel could reasonably rely upon an oral remark of the clerk of the Common Pleas Court,

threatening the entire town, served to prejudice the jury against defendant. The record does not indicate that any of the empaneled purors had any prejudice resulting from any adverse publicity against defendant; and there was no motion by defendant for a change of venue. In fact, the newspapers referred to as reflecting adversely on defendant were out-of-town papers. Upon motion of defendant's counsel, and prior to completion of the *voir dire,* the recognizable officers in attendance were reduced to three. The objectionable testimony was stricken and the jury was directed to disregard it. There is no merit to this complaint.

The fourth complaint of defendant requires an explanatory statement as to the nature of the fraudulent scheme with which defendant was charged. The evidence tended to prove that defendant and his codefendants were working a variation of what is colloquially referred to as the "green goods" racket. The defendants claimed that, if United States currency, in the denomination of $100, was furnished, the equipment of defendant and his codefendants would convert each such $100 bill into a bill of a denomination of $1,000.

In conjunction with the arrest of a codefendant for a different crime, agents of the Federal Bureau of Investigation (with the consent of the codefendant and following the giving of advice as to his constitutional rights) searched his home and automobile and confiscated several items of equipment. These items were present in the courtroom and contained in suit cases.

Defendant states in his brief that: "The error of the court in the present case is not in permitting the items seized to be admitted into evidence but permitting the items to be paraded back and forth in front of the jury and in permitting extensive examination of the officers concerning the nature of said exhibits."

Following explanatory testimony, the contents of the suit case were offered into evidence out of the hearing of

the jury, but they were rejected by the court. Contrary to the implications of defendant in his use of the phrase, "paraded back and forth," the cases were never opened. In this case, the search was not illegal, no pre-trial motion to suppress was made despite defendant's knowledge of the seizure of the evidence (see *State v. Davis* (1964), 1 Ohio St. 2d 28, 203 N. E. 2d 357), and the items were never admitted into evidence.

Defendant's fifth and sixth complaints relate to the proper construction of statutes specifying the two crimes for which defendant was convicted and the alleged repugnancy of one to the other.

Larceny by trick is defined in Section 2907.21, Revised Code, which provides in part:

> "*No person shall obtain possession of,* or title to, *anything* of value *with* the *consent* of the person from whom he obtained it, provided he *induced* such consent *by* a *false* or *fraudulent representation,* pretense, token, or writing." (Emphasis added.)

Blackmail is defined in Section 2901.38, Revised Code, which provides in part:

> "*No person shall, by threat delivered orally or by written or printed communication demand of another* a chattel, *money,* or valuable security, *or* accuse, *or* knowingly send or deliver a written or printed communication, with or without a name, or with a letter, mark, or designation, accusing or threatening to accuse another person of a crime punishable by law, or of immoral conduct, which if true, would tend to degrade or disgrace such other person, or threatening to expose or publish any of the infirmities or failings of another, or to subject such other person to the ridicule or contempt of society, or to do any injury to the person or property of another with intent to extort or gain from him a chattel, money, or valuable security or a pecuniary advantage, or, with intent to compel another to do an act against his will." (Emphasis added.)

Defendant argues that, since larceny by trick requires the consent of the defrauded victim, the person who is guilty of that crime cannot also have blackmailed the victim in order to obtain the same thing of value from him. However, for larveny by trick, the defendant has to "obtain possession" of the quantity of money involved, while for blackmail he needed only to make a "threat" and a "demand" for that money and did not need to obtain possession of it. See *Elliott v. State* (1881), 36 Ohio St. 318. In other words, the defendant could be guilty of blackmail because of a demand for certain money accompanied by a threat, and he could also be guilty of larceny by trick because he obtained possession of the same money with consent of the person from whom it was obtained which was induced by a false or fraudulent representation.

It is contended that there was no evidence to support the charge of larceny by trick because the victim testified that he was afraid of the threats of harm to his family and this was the principal inducement for his consenting to the defendant's getting possession of his money.

However, the jury could reasonably infer from the evidence that the victim has been persuaded to part with his money by false representations about the probable success of the denomination alteration scheme. Despite the threats made, the defendants never withdrew their promise to return the victim's money, plus a profit.

Defendant attacks the blackmail conviction by asserting a construction of Section 2901.38, Revised Code, which treats the phrases following the word "designation" as setting out the only type of criminal threats or accusations constituting the crime. This overlooks the words of that section which establishes as one sufficient blackmail purpose, "by threat * * * (to) demand of another a chattel, money, or valuable security." The simple term, "threat," which may be either oral or in writing, is used without limitation. The evidence tended to prove that defendant

made a demand for money with a threat of harm to the victim's family.

It is not necessary for us to decide whether the threat to the victim's family was sufficient to allow the jury to conclude that the victim felt threatened in his own person or property as those words are used in Section 2901.38, Revised Code.

Defendant argues also that threats of physical harm to the members of a person's family are separately provided for in Section 2901.32, Revised Code, which reads in part as follows:

> "No person shall orally, or by telegraph, telephone, or by written or printed communication, or by any other means, maliciously and willfully threaten to abduct, kidnap, lead, take, carry away, decoy, wound, maim, or kill any person, or one related by blood, marriage, or adoption to such person, with intent thereby to extort money, goods, chattels, or any other things of value."

However, the reference therein to "one related by blood, marriage, or adoption" has no more reason to be considered exclusive than has the reference in Section 2901.38, Revised Code, to a threat to the physical safety of "any person." The mere fact that defendant can demonstrate other statutes which he may have violated does not prevent a finding of his guilt under Section 2901.38, Revised Code.

The last complaint of defendant depends primarily upon his claim of mutual repugnancy between the two crimes of which he was convicted. We have rejected that contention, and it is therefore not a cruel and unusual punishment for defendant to be sentenced to consecutive terms.

There was no prejudicial error, and the convictions on counts one and three of the indictment are therefore affirmed.

Judgment affirmed.

ZIMMERMAN, O'NEIL and SCHNEIDER, JJ., concur.

MATTHIAS, J., dissents.

HERBERT and DUNCAN, JJ., not participating.

APPENDIX B-3
IN THE COURT OF APPEALS, HIGHLAND COUNTY, OHIO

No. 181

STATE OF OHIO,
Plaintiff-Appellee,

vs.

THOMAS WILKINSON,
Defendant-Appellant.

ENTRY

This cause came on for hearing upon the appeal on questions of law, assignments of error, bill of exceptions, the transcript and the original papers and record from the Court of Common Pleas of Highland County, Ohio, and upon consideration thereof, the Court fails to find any error appearing on the record in the judgment or proceedings of the Court below prejudicial to the rights of the appellant, Thomas Wilkinson, and the judgment is therefore affirmed, at appellant Thomas Wilkinson's costs, and it is ordered that a mandate issue to the Court below for enforcement of the judgment and execution of sentence. The court certifies, however, that there was reasonable grounds for this appeal. To all of which appellant, Thomas Wilkinson, by his counsel, excepts.

ENTER:

GORDON GRAY—*J*
HOMER ABELE—*J*
MARSHALL CARLISLE—*PJ*

APPROVED:
WILSON, WILSON & WILSON,
Attorneys for Defendant-Appellant Thomas Wilkinson.
JOHN O. CROUSE,
Attorney for Plaintiff-Appellee.

APPENDIX B-4
IN THE COURT OF APPEALS, HIGHLAND COUNTY, OHIO

No. 181

STATE OF OHIO,
Plaintiff-Appellee,

vs.

THOMAS WILKINSON,
Defendant-Appellant.

OPINION
APPEAL ON QUESTIONS OF LAW

GRAY, J.

This cause is in this court on an appeal on questions of law from two judgments of the Court of Common Pleas finding defendants, Wilkinson and Maynard guilty on two counts of an indictment, to-wit: obtaining money by false pretenses and obtaining money by means of extortion.

Defendant, Wilkinson, feeling aggrieved thereby filed his notice of appeal and assigned the following errors:

1. The trial court erred in not granting appellant a continuance.
2. The trial court erred in not granting appellant a new trial.
3. The trial court erred in admitting evidence into the record concerning certain exhibits which were not admitted.
4. The trial court erred in admitting evidence into the record concerning the imprisonment of appellant.
5. The trial court erred in admitting evidence into the record concerning pleadings in a civil action.
6. The trial court erred in admitting into evidence statements of the complaining witness of a prejudicial nature.
7. The trial court erred in admitting into evidence statements concerning what is called "green goods scheme."

8. The trial court erred in overruling appellant's motion for a directed verdict.

9. The trial court erred in its instructions to the jury.

10. The final order and judgment of the trial court is contrary to law and against the weight of the evidence.

11. The trial court erred in denying appellant a new trial.

12. The trial court erred in denying appellant a separate trial.

13. Other errors of law occurring at the trial.

Defendant, Maynard, also feeling aggrieved by this action of the trial court filed his notice of appeal and assigned the following errors:

1. That the state failed to prove its case of Larceny by Trick and Extortion or Blackmail beyond a reasonable doubt.

2. That the jury verdict is not sustained by sufficient evidence.

3. That the jury verdict is contrary to the evidence.

4. That the jury verdict is contrary to law.

5. That the court erred in permitting the introduction of evidence on items not in evidence.

6. That the inflammatory remarks of the Attorney General of the State of Ohio prior and subsequent to his re-election prevented the defendant from having a fair and impartial trial.

7. That the defendant was prevented from having a fair and impartial trial by the State of Ohio.

8. That the court erred in its instruction to the jury.

9. That the widespread publicity of defendant's alleged membership in an alleged notorious gang prevented him from having a fair and impartial trial.

10. And for all other errors apparent on the face of the record to the prejudice of the defendant and by reason of which he was prevented from having a fair trial as affirmatively appears on the record.

In the first assignment of error the defendant, Wilkinson, complains that the court should have granted a continuance and did not.

The case was set for trial for November 21, 1966, on August 9, 1966 by entry of the trial court on oral motion of counsel. November 21, 1966 was the day the trial started. Counsel for defendant Wilkinson claims that the Clerk of Courts informed him that it was the Clerk's understanding that Wilkinson's trial on counts 1, 2, 3, of the indictment would not be tried on November 21, 1966. Counsel for Wilkinson contends that regardless of who was right there was confusion to the detriment of defendant Wilkinson. This assignment of error is overruled as the granting of a continuance by the trial court is within its sound discretion. The trial court did not abuse its discretion.

The other branch of the first assignment of error is that a continuance should have been granted by the trial court because a proper bill of particulars had not been timely filed. The office of a bill of particulars is often misunderstood. From the motions filed for the bill of particulars it is evident that defense counsel wanted evidence given to them. This is not required of the prosecution. We think that the various counts of the indictment adequately informed defendants of the charges against them and certainly with the bill of particulars filed, defendants had knowledge of the charges against them.

See—*Foutty v. Maxwell* 174 Ohio St. 35, 36—*Boynton v. Sacks* 173 Ohio St. 526, 529—*State vs. DeRighter,* 145 Ohio St. 552, 556.

Counsel for defendant Wilkinson, under protest, sat at counsel table. It is his contention that he was not prepared for trial. It is noted in the record that he conferred fifty-five times during the trial with counsel for the other two defendants. This assignment of error is overruled.

The court will consider assignments of errors, 2, 8, 10 and 11 as they deal with the same question.

After consideration of the record we came to the conclusion that these assignments are not well taken.

When the evidence in a criminal case tends to sustain all the essential elements charged in the indictment, it is error for the trial court to withdraw the case from the jury and discharge the defendant. *State vs. Axe,* 118 Ohio St. 514; *State vs. Shively,* 172 Ohio St. 128, 132; *Painesville Utopia Theatre Co. v. Lautermilch,* 118 Ohio St. 167; *Cooper v. State,* 121 Ohio St. 562.

No evidence was introduced by defendants to refute that introduced by the state.

In assignment of error No. 3, defendant claims there was an illegal search and seizure of evidence because the F.B.I. agents did not have a warrant for arrest with them when they arrested Maynard alias Robinson.

The motion to suppress the evidence was filed November 22, 1966, which was after the trial had started. Defendants waived their rights to have a hearing on this matter. See *State v. Davis* 1 Ohio St. (2) 28; *Williams v. Eckle,* 173 Ohio St. 410.

Even if the defendants had not waived this right we believe that the search and seizure was proper. It is not necessary that Federal agents have the warrant for arrest with them at the time an arrest is made.

See Title 18 U.S.C.A. Rule 4 (c) 3 at page 110 *U.S. v. Burkhart* (Ky. 1965) 347 F. (2) 772; *In Re Kosopod* (Ohio) 272 F. 330, 336.

For further light on search and seizure see:

Harris v. U.S. 331 U.S. 145.
Abel v. U.S. 362 U.S. 217.
State v. Beck 175 Ohio St. 73, 75.
Draper v. U.S. 358 U.S. 307.
Saulsbury v. Green, Supt. 175 Ohio St. 433, 434.
Dixon v. Maxwell, Warden, 177 Ohio St. 2c.

We do not think that the trial court committed prejudicial error in this respect. The trial court took care of this

matter as expeditiously as possible. Hence, there was no error. See 23 CJS Sec. 1039 p. 1174.

In the fourth assignment of error, defendant Wilkinson claims error in that it was brought out on trial that he was in federal prison and needed $16,000.00 to apply on his bond. We think that this evidence was admissible under Section 2945.59 R.C. This assignment of error is overruled.

In the fifth assignment of error defendant claims that the reading of the affidavit of attachment filed in a civil case was prejudicial to him. True, it was repetitious but we do not think it prejudicial.

23 CJS p. 1147, 1148 and 1149, Sec. 1033, Criminal Law states:

> "* * * the Judge has a wide discretion in the reception or rejection of testimony, which should be exercised in the light of the case as it is presented, not in the light of what theoretically might have been presented under the indictment but was not presented."

In regard to the sixth assignment of error see 23 CJS Sec. 1033 Criminal Law cited under fifth assignment of error.

In the seventh assignment of error complaint is made that the FBI agents testified as to what the "green goods scheme" was.

The competency of experimental evidence depends on its trustworthiness to aid in the proper solution of the problem at hand; if the experimental evidence contributes to the end of finding the truth of the matter in controversy, it is admissible; otherwise it should be excluded. 22 A CJS Sec. 645 (1) p. 519.

32 CJS p. 760 Sec. 603—Amplification on explanation of evidence.

> "Use of body, articles, furniture, etc. by the witness or counsel may be permitted to illustrate or explain the evidence."

See (2) Expert and Opinion Evidence, 31 Am. Jur. (2) Sec. 29, p. 528, et seq. and Sec. 151, p. 712, et seq. This assignment of error is overruled.

We have examined the other errors assigned and find none well taken.

Defendants are entitled to a fair trial and not a perfect one. *Lutwak v. U.S.* 344 U.S. 604. Defendants received a fair trial.

Judgments affirmed.

CARLISLE, PJ & ABELE, J. concur.

JOHN O. CROUSE, *Prosecuting Attorney*
Hillsboro, Ohio
and
DAVID KESSLER, *Assistant Attorney General*
Counsel for Plaintiff-Appellee.

CHARLES H. WILSON
108 E. Mulberry St.
West Union, Ohio
Counsel for Thomas Wilkinson

PAUL W. RION
25 S. Main Bldg.
Dayton, Ohio
Counsel for Houston Maynard.

CERTIFICATE OF SERVICE

I, George E. Tyack, the attorney for Thomas Wilkinson, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the .... day of ....., 1969, I served copies of the foregoing Petition for Certiorari on parties thereto as follows: John O. Crouse, Prosecuting Attorney, Highland County, Hillsboro, Ohio, by certified mail, postage prepaid, return receipt requested.

GEORGE E. TYACK
Counsel for Petitioner.

SUPREME COURT, U. S.

FILED

MAY 26 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1343

THOMAS WILKINSON, Petitioner

vs.

STATE OF OHIO, Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

George E. Tyack,
Eight East Broad Street
Columbus, Ohio 43215
Member of the Bar of the
United States Supreme Court
Counsel for Petitioner

JOHN O. CROUSE,
Prosecuting Attorney
Highland County, Ohio
Hillsboro, Ohio
Counsel for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

Case No. 1343

THOMAS WILKINSON, Petitioner

vs.

STATE OF OHIO, Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

A writ of certiorari should not issue to review the judgment of the Supreme Court of the State of Ohio entered in the above case on February 5th, 1969.

STATEMENT OF THE CASE

On March 12, 1966, an affidavit was filed in the Hillsboro, Ohio Municipal Court against the petitioner and two other defendants charging them with larceny by trick. The petitioner was indicted by the Grand Jury of Highland County along with the other two defendants. The indictment contained six counts of which the first three were tried in the trial court in the instant case.

On August 9th, 1966, the Court by journal entry, which entry was approved by petitioner's counsel, set the trial date of November 21, 1966 upon the first three counts of the indictment. The petitioner filed for a bill of particulars on October 27, 1966. The Court sustained the motion in several respects on November 16, 1966 and a bill of particulars was filed in compliance therewith on November 18, 1966, and on the same day petitioner's counsel was served a copy of the bill.

On the 21st day of November, the first day of trial,

petitioner's counsel appeared in court for something more than the purpose of observing the trial of the other two defendants. On that morning, counsel for petitioner filed a written motion for a continuance alleging several grounds. (See Appendix A.) There was no allegation alleging failure of notice of the trial date in the motion. This same morning of November 21st, 1966, the Clerk of Courts made a statement to counsel for petitioner concerning the matter of petitioner being on trial that day. Petitioner's counsel then orally raised this as a grounds for a continuance.

The trial judge thoroughly explored the various written grounds for a continuance and went so far as to send petitioner to a physician to ascertain if he were physically able to stand trial. The trial judge thoroughly examined the merits of the oral grounds for a continuance (lack of notice) and overruled petitioner's motion.

Throughout the trial, petitioner's counsel participated in the trial by way of interposing objections and acted very effectively in conjunction with the two other attorneys representing the other two defendants, as indicated by the record.

There were several police officers present in the court room in uniform because of witness intimidation and threats as reflected in the record of evidence at Page 53.

> "We got one female witness who has been beat up already. We have another male witness who was beat up and at the time of being beat up, one of the honorable defendants also made the statement that, 'Aren't you Charlie so and so?' and he said, 'No, I am his brother.' 'Oh,' he said, 'We made a mistake.' Then there have been numerous threats on the main witness in this case and furthermore, one (defendant) said they would come down here and blow this damn town off the map."

At the trial, counsel for the petitioner interposed an objection concerning the number of uniformed officers (R. 52), and the number of officers in uniform was reduced to three.

ARGUMENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

I. WHERE COUNSEL FOR PETITIONER IS NOTIFIED BY ENTRY WHICH HE APPROVED AND WHICH ENTRY WAS JOURNALIZED BY THE TRIAL COURT SETTING THE CAUSE FOR TRIAL, AND ON THE MORNING OF TRIAL, THE CLERK OF COURT MAKES A STATEMENT TO COUNSEL WHICH INDICATES THAT PETITIONER WILL NOT GO ON TRIAL THAT MORNING, HAS PETITIONER BEEN DEPRIVED OF DUE PROCESS OF LAW BECAUSE THE TRIAL COURT FAILED TO SUSTAIN HIS MOTION FOR A CONTINUANCE?

Counsel for petitioner presented himself on the morning of the trial and filed a written motion for continuance which alleged several grounds, none of which was the allegation that he received no notice of trial. As an additional oral ground for a continuance, counsel for petitioner stated he was not prepared to go to trial because of the statement of the Clerk of Courts that petitioner would not be tried. This statement was made one-half hour before trial time (R. 16) and in no way could have interfered with petitioner's preparation of his defense. Counsel for petitioner knew that the first three counts of the indictment would be tried on that day. He had prepared one entry to that effect with his approval endorsed thereon and had three or four conversations with the Court concerning this matter. Further, the decision

on petitioner's motion for a bill of particulars was filed November 16, 1966, and counsel for petitioner was ordered to prepare the entry. This decision related to the first three counts for which petitioner was to be tried. If counsel for petitioner did not believe petitioner was to be tried on November 21st, 1966, why did he appear that day and file a motion for a continuance?

As reflected in the record, counsel for petitioner did participate in the trial.

II. WAS THE PETITIONER DENIED DUE PROCESS OF LAW WHEN HE DID NOT SEASONABLY REQUEST A BILL OF PARTICULARS?

Ohio Revised Code Section 2941.07 provides for a bill of particulars as follows:

> "* * * The Prosecuting Attorney, if seasonably requested by the defendant, or upon order of the Court, shall furnish a bill of particulars setting up specifically the nature of the offense charged."

Petitioner waited until twenty-five days before trial to file the motion for a bill of particulars. On November 16th the Court ruled upon the motion and on November 18th, the bill of particulars was filed and on the same day a copy of the bill was served on petitioner's counsel. The purpose of a bill of particulars is not to disclose the state's evidence but simply to state specifically the nature of the offense charged. **State of Ohio** vs. **DeRighter,** 145 Ohio St. 552.

The Supreme Court of Ohio held in this case before the Court that petitioner did not seasonably request a bill of particulars.

III. HAS THE PETITIONER BEEN DENIED A FAIR AND IMPARTIAL TRIAL WHEN THIRTEEN UNIFORMED POLICE OFFICERS WERE PRESENT IN THE COURT ROOM AND NEWSPAPER

ARTICLES RELATING TO THE TRIAL WERE PUBLISHED OUTSIDE THE COMMUNITY WHERE THE TRIAL TOOK PLACE?

As set forth in the statement of facts, there was reason for the police officers to be present in the court room. Upon the objection of counsel for petitioner and prior to completion of the voir dire of the jury, the number of uniformed police officers was reduced to three.

The newspapers referred to as reflecting adversely to petitioner were out of town newspapers located in Dayton, Ohio, a city approximately fifty-five miles from the site of the trial. The record of the trial does not indicate that any of the impaneled jurors had any prejudice resulting from adverse publicity against petitioner and there was no motion made by petitioner for a change of venue.

Petitioner had a fair and impartial trial and was not denied effective assistance of counsel nor due process of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

JOHN O. CROUSE
Counsel for Respondent

APPENDIX A

Highland County } ss.
State of Ohio }

COURT OF COMMON PLEAS
No. 5092

THE STATE OF OHIO, Plaintiff

vs.

THOMAS WILKINSON ET AL, Defendants

MOTION

Now comes the defendant, Thomas Wilkinson and moves the Court for an order continuing the trial of this case insofar as it pertains to this defendant, for the following reasons, to-wit:

1. That on or about the 26th day of October, 1966 this defendant made a motion and demand for a Bill of Particulars herein as is provided by Section 2941.07 of the Revised Code of Ohio, but no order was made thereon until November 16, 1966 and no Bill of Particulars was filed or furnished until November 1966 a copy thereof having been furnished the attorney for the defendant on November 18, 1966 at 4:15 o'clock P. M. as he was leaving his office.

2. That no Bill of Particulars have been furnished as ordered by this Court and the purported bill of particulars filed herein on November 18, 1966 does not comply with the order of this Court made on November 16, 1966.

3. Due to the lack of a Bill of Particulars this defendant has not had sufficient time to properly prepare his defense herein.

4. The ends of justice requires such a continuance.

5. Not knowing the facts that would be divulged by a

proper bill of particulars this defendant did not know what witnesses would be required nor have any witnesses been subpoened for the defense.

6. In the event an Alibi would be used the defendant does not have time to give notice as is required in Section 2945.58 of the Revised Code of Ohio.

7. That due to physical disability this defendant cannot proceed with trial.

Respectfully submitted,

Attorneys for Defendant
Thomas Wilkinson

MEMORANDUM

Section 2945.02 of the Revised Code of Ohio.

APPENDIX B

Ohio Revised Code Section 2945.02. Setting and continuing cases.

The court of common pleas shall set all criminal cases for trial for a day not later than thirty days after the date of enry of the plea of the defendant. No continuance of the trial shall be granted except upon affirmative proof in open court, upon reasonable notice, that the ends of justice require a continuance.

No continuance shall be granted for any other time than it is affirmatively proved the ends of justice require.

Whenever any continuance is granted, the court shall enter on the journal the reason for the same.

Criminal cases shall be given precedence over civil matters and proceedings. The failure of the court to set such criminal cases for trial, as required by this section, does not operate as an acquittal, but upon notice of such failure or upon motion of the prosecuting attorney or a defendant, such case shall forthwith be set for trial within a reasonable time, not exceeding thirty days thereafter.

CERTIFICATE OF SERVICE

I, John O. Crouse, Prosecuting Attorney for the State of Ohio, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of May, 1969, I served copies of the foregoing Brief in Opposition to the Petition for a Writ of Certiorari on parties thereto as follows:

George E. Tyack, Eight East Broad Street, Columbus, Ohio 43215, by certified mail, postage prepaid, return receipt requested.

John O. Crouse
Counsel for Respondent